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No. 80-218

In the Supreme Court of the United States

OCTOBER TERM, 1979

RONALD B. SHERWOOD, PETITIONER

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Anderson v. *Laird,* 466 F. 2d 283, cert. denied, 409 U.S. 1076 3

Brown v. *Glines,* 444 U.S. 348 3

Burns v. *Wilson,* 346 U.S. 137 3

Gillette v. *United States,* 401 U.S. 437 4

Greer v. *Spock,* 424 U.S. 828 3

Parker v. *Levy,* 417 U.S. 733 3

Wisconsin v. *Yoder,* 406 U.S. 205 2

Constitution and regulation:

United States Constitution, First Amendment 2, 3, 4

Navy Uniform Regulations, Article 0112 1

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Petitioner contends that a Navy uniform regulation forbidding the wearing of any uniform or insignia except those prescribed by the Navy (Article 0112, Navy Uniform Regulations)[1] is, as applied to him, an unconstitutional impairment of his right to free exercise of religion.

1. Petitioner was court martialed and subsequently discharged from the Navy after repeatedly refusing to remove a turban he wore in lieu of a regulation sailor's

[1]This regulation provides (Pet. App. A4):

> All Naval personnel shall provide themselves with an adequate supply of the correct uniforms in these regulations and are forbidden to possess or wear any other than the regulation uniform or insignia of their representative grades, corps, or ratings, or to wear decorations, medals, badges, or their ribbons in any way other than prescribed.

cap. He argued throughout the military proceedings and this litigation that the religion to which he converted after three years of Naval service, Sikhism, requires the wearing of a turban (Pet. App. B1-B2).[2] After exhausting administrative appeals, petitioner brought suit in the United States District Court for the Southern District of California seeking a declaration that the Navy uniform regulation, as applied to him, impermissibly burdened his First Amendment religious liberty. Petitioner also sought reinstatement and damages (*id.* at B2-B3). The district court granted the government's motion for summary judgment (Pet. App. B1-B9), holding that "the Navy's interest in a uniform appearance and protective clothing and headgear for its personnel is sufficiently strong to overbalance [petitioner's] desire to wear the turban of a Sikh while in the Navy" (*id.* at B8). The court of appeals affirmed (Pet. App. A1-A3).

2. The decision below is correct, is consistent with the decisions of this Court, and does not conflict with any decision of another court of appeals. Therefore, further review is unwarranted.

Both courts below adopted the position that the compelling state interest-least restrictive alternative test articulated in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), should be applied here and concluded that the Navy's safety interests were sufficiently compelling and the regulation sufficiently narrow to satisfy that standard. There is ample evidence in the record to support this conclusion (Pet. App. B6-B8, A2-A3).

However, even assuming that the district court's findings were inadequate to establish a compelling governmental interest or no less restrictive alternative, the

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[2]That the wearing of a turban is a tenet of the Sikh religion was not contested by the Navy.

decision below is sustainable on the basis of *Brown* v. *Glines*, 444 U.S. 348 (1980). In *Brown*, this Court reaffirmed that the military is, " 'by necessity, a specialized society separate from civilian society,' " and that because of its peculiar and exceedingly important mission with its attendant needs for discipline, efficiency and reliability, " 'a different application' " of First Amendment protections is required (444 U.S. at 354, quoting *Parker* v. *Levy*, 417 U.S. 733, 743, 758 (1974)). Thus, while military personnel are entitled to First Amendment protection, their rights "must yield somewhat ' "to meet certain overriding demands of discipline and duty * * * " ' " (*ibid.*, quoting *Parker* v. *Levy*, *supra*, 417 U.S. at 744, and *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953)). Accordingly, the proper test in this case is whether the military regulation in question restricts First Amendment freedoms[3] "no more than is reasonably necessary to protect [a] substantial governmental interest" (444 U.S. at 355) "unrelated to the suppression of free expression" (*id.* at 354).

The evidence presented to the district court by the government plainly satisfied this burden. The requirement that all Navy personnel wear military headgear was demonstrated to be reasonably necessary to further a substantial Navy interest in safety, an interest far removed from the suppression of religious liberty.

Petitioner's reliance (Pet. 5) on *Anderson* v. *Laird*, 466 F. 2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972), is misplaced. At issue in *Anderson* was the constitutionality of compulsory chapel attendance at the military

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[3]While *Brown* and earlier cases such as *Greer* v. *Spock*, 424 U.S. 828 (1976), address the speech and press guarantees of the First Amendment, there is no apparent justification for treating the religion clauses any differently.

academies. The court found that any form of compelled worship offended the core values of the First Amendment and that the regulation there at issue was a paradigm of the kind of governmental abuse the framers of the Amendment sought to prevent. The present case, however, is clearly distinguishable in that it involves, as the district court observed (Pet. App. B8), a requested exemption or accommodation not required by the First Amendment. The Navy *may* grant, as the Army has granted (Pet. 8), persons of the Sikh faith an exemption from the uniform regulations, but it is not *compelled* to do so. Cf. *Gillette* v. *United States*, 401 U.S. 437, 461 n. 23 (1971) (suggesting that exemptions for conscientious objectors from military service, while a legitimate exercise of legislative discretion, are not mandated by the Free Exercise Clause).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

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[4]As the district court observed (Pet. App. B6), "[u]nlike the Army, virtually all naval activities are conducted in close proximity to complex machinery of an often hazardous nature. Dangerous operating conditions cannot be tolerated. The accomplishment of an entire naval mission may be impaired by the failure of a single individual to perform his assigned task."